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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

WALTER ELAM,

Plaintiff,

v.

CONCOURSE VILLAGE, INC., ANTHONY JAMES, *individually, and* LETITIA BOWRY, *individually,*

Defendants.

No. 15 Civ. 7215 (CM)

## DECISION ON PLAINTIFF'S MOTIONS IN LIMINE

McMahon, C.J.:

Plaintiff Walter Elam moves *in limine* to preclude: (1) his 1989 criminal plea and conviction; (2) any mention that he stated on tax forms that he was "single" while he was married; (3) documents related to his Complaint to the New York State Division of Human Rights (the "Division of Human Rights") and his Right-to-Sue Letter from the Equal Employment Opportunity Commission ("EEOC"); and (4) after-acquired evidence of hand grenades and pornographic DVDs found in the Concourse Village stockroom after the termination of Plaintiff's employment.

Decisions on these four motions *in limine* are as follows:

### 1. Motion to Preclude Evidence of Plaintiff's 1989 Criminal Plea and Conviction

In 1989, Elam pleaded guilty to attempted criminal possession of a weapon, which was later dismissed in its entirety in 1992 because the weapon, a gun, was seized in an unlawful search. (Harman Decl. ¶ 4, Ex. B (*People v. Elam*, 584 N.Y.S.2d 780 (1st Dep't 1992)).) Elam subsequently moved to seal all official records and papers relating to his arrest and prosecution on file with the court and to make the records unavailable to any person or public or private agency. (Harman Decl. ¶ 5, Ex. C.)

Elam argues principally that the conviction is inadmissible to impeach his character for truthfulness under Federal Rule of Evidence 609(b)(1) because it is more than 10 years old and its probative value, supported by specific facts and circumstances, is substantially outweighed by its prejudicial effect. He also argues that, under Federal Rule of Evidence 609(c)(1), the 1989 conviction is not admissible to attack his character for truthfulness. This rule makes the prior conviction inadmissible if "the conviction has been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure based on a finding that the person has been rehabilitated, and the person has not been convicted of a later crime punishable by death or by imprisonment for more than one year." Fed. R. Evid. 609(c)(1).

Defendants do not oppose Elam's motion to preclude evidence of this dismissed 1989 criminal offense. (*See* Defs.' Mem. in Opp'n at 1 n.1.)

Elam's conviction was vacated, so as a technical matter Rule 609(b)(1) is of no relevance. However, Elam did admit under oath to possessing a weapon back in 1989, and the vacatur of his conviction on grounds unrelated to the voluntariness of that admission does not eliminate the possibility that it could be used against him at trial. However, Elam's admission will not be admitted and may not be used to impeach his veracity, because the probative value of this ancient admission from almost three decades ago is substantially – indeed, entirely – outweighed by its prejudicial value. In this case, after Elam was fired, Defendants discovered what appeared to be two hand grenades allegedly belonging to Elam in the Concourse Village stockroom. Since the jury may eventually learn about this after-acquired evidence (see below), it would be highly prejudicial to tell the jury that once upon a very long time ago he possessed a weapon.

Rule 609(c)(1) is also without relevance here. Elam contends that New York Criminal Procedure Law ("CPL") § 160.50 – the provision pursuant to which his conviction was vacated – is an "equivalent procedure" to a pardon, annulment, or certificate of rehabilitation. He is incorrect in that assessment. The conviction was overturned because of police misconduct, not because Elam was found to have been rehabilitated.

**2. Motion to Preclude Evidence that Plaintiff Lied About His Marital Status on Tax Forms**

Elam's 2009 and 2013 tax forms indicate that his marital status is "single," although he was purportedly married at those times. When asked about one of these tax forms at his deposition, Elam testified that he did not fill out the form, but that he only signed it and that the handwriting on the form was not his handwriting. (Elam Dep. 41:5-42:24.) Elam moves to preclude evidence of the tax forms. The motion is unopposed by Defendants. (*See* Defs.' Mem. in Opp'n at 1 n.1.)

Under Federal Rule of Evidence 608(b)(1), "extrinsic evidence is not admissible to prove specific instances of a witness's conduct in order to attack . . . the witness's character for truthfulness. But the court may, on cross-examination, allow them to be inquired into if they are probative of the character for truthfulness or untruthfulness" of the witness.

That Elam may have lied under oath on a tax form could be probative of his character for truthfulness. Thus, any untrue statements on Elam's tax forms – which are subscribed under oath – could be used on cross-examination to impeach Elam's credibility. However, as Defendants have indicated that they do not intend to raise this issue at trial (where they would be bound by Elam's answer, since the collateral matter rule would bar them from proving that his answer was false), it appears that there will be no issue at trial.

### 3. Motion to Preclude Evidence About Plaintiff's Complaint to the New York State Division of Human Rights and the EEOC Right-to-Sue Letter

Elam moves under Federal Rule of Evidence 403 to preclude evidence related to the complaint that he filed with the Division of Human Rights and the EEOC Right-to-Sue letter. He argues that evidence related to the complaint has "no probative value, would be highly prejudicial, and would lead to jury confusion." (Pl.'s Mem. of Law at 6.) In particular, he asserts that the complaint would be highly prejudicial because "it would make it appear that Plaintiff changed the basis for his complaint of discrimination and would cause jury confusion." (*Id.* at 6 n.1.) Elam also indicates that the Division's finding related to the complaint would be highly prejudicial because it would "improperly suggest to the jury that it should reach the same conclusion as the administrative body." (*Id.* at 6.)

The Right-to-Sue letter is hearsay and utterly irrelevant – its sole purpose is to prove that plaintiff has satisfied the jurisdictional prerequisites to bringing suit, and that is not an issue for the jury. It will not be admitted.

As a rule, this Court does not permit a party's administrative complaints to be admitted into evidence. To the extent that statements in the administrative complaint are inconsistent with a position taken by the plaintiff at trial, the defense is, of course, free to bring that fact out on cross-examination. This Court sees no reason to vary from its usual procedure in this case.

Extrinsic evidence of a witness's prior statement is admissible to impeach his credibility if: "(1) the statement is inconsistent with the witness's trial testimony, (2) the witness is afforded an opportunity to deny or explain the same, and (3) the opposing party is afforded the opportunity to cross-examine the witness thereon." *United States v. Strother*, 49 F.3d 869, 874 (2d Cir. 1995); *see* Fed. R. Evid. 613(b). Prior inconsistent statements must also relate to an issue that is not merely collateral: "A witness may be impeached by extrinsic proof of a prior inconsistent statement only as to matters which are not collateral, *i.e.*, as to those matters which are relevant to the issues in the case and could be independently proven." *United States v. Blackwood*, 456 F.2d 526, 531 (2d Cir. 1972).

The administrative complaint that Elam submitted to the Division of Human Rights contains statements that are germane to the instant action. Therefore, to the extent that its contents are inconsistent with statements that Elam makes at trial, it can be used to impeach him.

### 4. Motion to Preclude the Use of After-Acquired Evidence

Two weeks after Elam's employment with Concourse Village was terminated, Defendant Anthony James, in the presence of other employees including Calvin Reed, discovered a locked area inside the Concourse Village stockroom. (Gunther Decl., Ex. 4 (Reed Aff. ¶ 2).) Inside the locked area, James and Reed found a chest of drawers that contained "what appeared to be a hand grenade"[1] and pornographic DVDs. Defendants assert that these items belonged to Elam. (Gunther Decl., Ex. 4 (Reed Aff. ¶ 5).) At least one Concourse Village employee has submitted an affidavit stating that he purchased pornographic DVDs from Elam. (Gunther Decl., Ex. 5

[1] Defendants' proposed trial exhibits contains a photo of what appears to be two hand grenades. (DX-46.)

(Wright Aff. ¶¶ 2-3).) I will assume, for purposes of this motion, that Defendants would be able to establish that Elam had access to the locked area.

Defendants have pleaded, as an affirmative defense, that after-acquired evidence of Elam's wrongdoing as an employee limits the relief that he is seeking. (Answer, Dkt. No. 21.) Elam moves *in limine* to preclude any evidence about the items discovered in the locked area of the stockroom.

"While the Supreme Court has held that after-acquired evidence of employee wrongdoing does not bar the employee's claims of employment discrimination, evidence that the employee would have been terminated for lawful reasons will make certain remedies, such as reinstatement and front pay, unavailable." *Greene v. Coach, Inc.*, 218 F. Supp. 2d 404, 412 (S.D.N.Y. 2002) (citing *McKennon v. Nashville Banner Pub. Co.*, 513 U.S. 352, 362 (1995)). An award of back pay may properly "be limited [in such cases] to salary lost from the date of the unlawful discharge until the date the employer discovered the information which would have led to discharge on lawful grounds." *Smith v. Tuckahoe Union Free Sch. Dist.*, No. 3 Civ. 7951, 2009 WL 3170302, at *11 (S.D.N.Y. Sept. 30, 2009).

The after-acquired evidence in this case can most certainly be used to limit Elam's recovery should he prevail on his discrimination claim. This suggests bifurcation of the trial, with separate phases to determine liability and to determine the appropriate remedy or damages. After-acquired evidence will only be admitted in the remedy/damages phase and will not be introduced prior to a determination of liability. Should Elam not prevail in the liability phase, the jury will never need to be made aware of the after-acquired evidence.

Elam separately argues that evidence of the discovered hand grenades should be excluded because they would be unfairly prejudicial and would mislead the jury. He points out that there is no foundation that the hand grenades are weapons instead of antiques, collectors' items, or toys. He further argues that Reed should be precluded from laying a foundation that the hand grenades were live or dangerous, since Federal Rule of Evidence 701 prohibits a witness who is not testifying as an expert to provide an opinion.

Elam's argument is rejected. I assume that no expert will testify about whether the grenades were live or not – certainly no such expert has been designated in accordance with Fed. R. Civ. P. 26 – but the fact that items appearing to be weapons were found secreted away on Elam's workplace premises is something the jury can consider in support of Defendants' argument that he would have been fired very shortly after he was actually fired. The jury's function is to determine whether Elam's possession of what appeared to be hand grenades gave his employer legitimate grounds to fire him – not to decide whether the hand grenades were, in fact, armed and dangerous. The photographs of the hand grenades and testimony about them and about the employer's policies regarding such items are admissible at the damages phase of the case. The hand grenades themselves will not be admitted.

Defendants also propose to offer photographs of pornographic DVD covers, (DX-41 & DX-42); and a box containing the pornographic DVDs found in Concourse Village's stockroom, (DX-48). Elam argues that the pornographic DVDs and any photographs of them should be excluded because they will unfairly prejudice him, be cumulative, and waste time. Again, he is incorrect. DX-41, DX-42 and DX-48 will be admitted during the damages phase of the trial. While the jury may see the covers of the DVDs, they will not be permitted to view the contents of the DVDs unless Elam disputes that the DVD are pornographic. Should he do so, the jurors will be allowed to view the DVDs, or at least portions of them.

This disposes of Elam's motions *in limine*. The Clerk of the Court is directed to remove the motion at Docket No. 69 from the Court's list of open motions.

Dated: April 7, 2017

U.S.D.J.

BY ECF TO ALL COUNSEL